SUPREME COURT, U. S.
DEC 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 923

JEFFERSON CONSTRUCTION CO. OF FLORIDA,
a Florida corporation,

Petitioner,

—vs.—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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CODE OF FEDERAL REGULATIONS (CFR)

The first edition was the 1949 Edition issued under Executive Order 9930, 4 February 1948, 13 F.R. 519, of which this Court is required to take judicial notice 3, 5, 12

There have been numerous Law Review Articles published dealing with Government contracts—Judicial Review, etc., the latest of which is the Spring Issue 1966 of the Duke Law Journal, page 372, et seq., "The Court of Claims and The Wunderlich Act: Trends in Judicial Review 4, 6, 9, 12, 15

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No. .....

JEFFERSON CONSTRUCTION CO. OF FLORIDA,
a Florida corporation,

Petitioner,

—vs.—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on 15 July 1966, rehearing denied 14 October 1966 (Tr. 335, 343 & 372).

Opinions Below

The opinion and decision of the United States Court of Claims rendered on 15 July 1966, rehearing denied 14 October 1966, has not yet been reported. A copy of such decision is appended hereto as *Appendix I*, page 19.

Jurisdiction

The judgment of the United States Court of Claims was rendered on 15 July 1966 (Tr. 335). Within season, plaintiff filed its petition for rehearing addressed thereto. On 14 October 1966 said petition for rehearing was denied by said Court (Tr. 372).

Jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1255(1).

Questions Presented

I.

Must the contractor under a Government Civil Works Project Contract (Standard Form 23) assume and bear the loss due to faulty and misleading Government drawings upon which invitations were solicited and which formed an integral part of the contract, on the theory that the contractor, when bidding, as a matter of self-protection, should have detected and ascertained such errors before bidding, notwithstanding:

(a) The invitation to bid contained no provision, as it does in many instances,* allowing the bidder during bidding time to seek from the Contracting Officer clarification and correction of the documents upon which bids were solicited.

(b) The invitation to bid contained an express reservation for the benefit of the Contracting Officer, which authorized revisions and changes in the bidding documents before reception of bids, but provided:

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* *Beacon Construction Company of Mass.* v. *U. S.*, 314 F. 2d 501, 161 Ct. Cl. 1, 10 May 1963; *Thompson Ramo Wooldridge Inc.* v. *U. S.*, 361 F. 2d 222, Ct. Cl., 13 May 1966—3 years after the *Beacon* case.

> "* * * If the revisions and amendments are of a nature which requires material changes in quantities or prices bid or both, the date set for opening bids may be postponed by such number of days as in the opinion of the District Engineer will enable bidders to revise their bids * * *."

A like provision was included in the contract that was involved in *Kaiser Industries Corporation* v. *U. S.*, 340 F. 2d 322, Ct. Cl. 22 January 1965, and apparently involved in *C. J. Langenfelder & Son, Inc.* v. *U. S.*, 341 F. 2d 600, 169 Ct. Cl. 480, 11 June 1965.

(c) The Court of Claims adjudicated that the contract drawings upon which invitations were solicited were grossly faulty, erroneous and misleading, and that the Contracting Officer had knowledge of such errors before accepting bids.

(d) Procurement Rule 41 CFR 1-2.101 (Volume 2, 41 U. S. C., p. 407) prescribed as the first "basic step" required to be taken by the Government, the following:

> "Preparation of the invitation for bids, describing the requirements of the Government *Clearly, Accurately* and *Completely*, * * *."

(e) Each bidder was, under Procurement Rule 41 CFR 1-2.301 (Vol. 2, 41 U. S. C., p. 421), required to submit his bid completely responsive to and in conformity with all the details shown on the contract drawings. Otherwise his bid would not be considered.

(f) The Court of Claims in its decision held

> "Perhaps the Contracting Officer, at this juncture, could have admitted his error and readvertised the contract with corrected drawings" (App. I, 26, 27).

Observe that the Commissioner's report, which was adopted by the Court, used this language:

> "Perhaps the ethical thing for the Contracting Officer to have done at this juncture would have been to admit his error and readvertise the contract with corrected drawings" (Tr. 242).

The change in the foregoing sentence was the only change made in the Commissioner's findings.

II.

What is the Scope of Review of the decision of the United States Corps of Engineers Board of Contract Appeals (herein called Eng. BCA) by the Court of Claims under APA (Administrative Procedure Act of June 11, 1946 [App. III], and the Wunderlich Act of May 11, 1954 [App. IV]), when the Eng. BCA held that the contract drawings and Specs (specifications), construed together, contained sufficient data to alert a prudent bidder of lurking danger due to faulty drawings? Is the construction and interpretation of the contract drawings one of fact, or of law? If one of fact, was it subsumed* in the larger question of the construction of the contract documents?

> "Fact is fact and law is law,
> and never the twain shall meet;
>
> Yet which is which and what is what,
> escapes e'en law's elite."
>
> (An oft-quoted famous parody)

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* The word "subsumed" was used by the Court of Claims in a decision cited in the instant case, *WPC Enterprises, Inc.* v. *U. S.*, 323 F. 2d 874, 163 Ct. Cl. 1, Decided January 24, 1964.

Is the question, whether the contract documents contain sufficient data to have warned and alerted a bidder, before bidding, of the errors, defects and misrepresentations contained in the contract plans, a question of law and not one of fact?

III.

Must a person undertaking to bid on a Government contract to be awarded on competitive advertised bids fortify himself with a staff of experts for the purpose, during the short bidding period (two weeks allowed in the instant transaction), of scrutinizing and checking the bidding documents prepared by the Government in order to ascertain the correctness vel non of every detail? Does not the bidder on a Government contract to be awarded on competitive bidding have a right to rely on the Government's expertise preparation of the contract documents? Is refusal to bid the only alternative for a bidder when the Government's drawings are faulty?

Is the Government's invitation to bidders to be treated as containing an implied or hidden warning (bidder beware), as to accuracy, adequacy and reliability of the contract documents and representations shown thereon?

IV.

What is the Scope of Review of a Court, as distinguished from an Administrative Agency, under the standard "Disputes Clause" prescribed by Procurement Rule 41 CFR, "Contract Clauses", Section 1-7.101-12, "Disputes" (Volume 2, 41 U. S. C., p. 541), when a controversy arises due to faulty and misleading contract drawings prepared by the Government, upon which the bidder to his detriment relies?

Statutes Involved

(a) Administrative Procedure Act (APA), Chapter 324, Public Law 404, 79th Congress, Second Session, 60 Stat. 237, approved 11 June 1946, effective three months thereafter, 5 U. S. C. A., Sections 1001 et seq. Section 10(e) of the Act, which is Section 9(e) of 5 U. S. C. A., Section 1009(e). A copy of said Act is to be found in *Appendix III.* The Legislative History and Congressional Comments on this Act are to be found in U. S. Code Congressional Service, 79th Congress, Second Session, page 1195, et seq.

(b) Wunderlich Act, Chapter 199, Public Law 356, 83rd Congress, Second Session, 68 Stat. 81, enacted 11 May 1954, 41 U. S. C. A., Section 321, 322. A copy of this statute is to be found in *Appendix IV.* The Legislative History and Congressional Comments concerning this Act are to be found in Volume 2, U. S. Code Congressional and Administrative News, 83rd Congress, Second Session 1954, page 2191 et seq.

Statement of the Case

Attached to the Petition filed in the Court of Claims were six exhibits which contained all the basic documents necessary for the measuring of the obligations and rights of the respective parties. In the Answer filed by the Government, these were admitted. Hence it is not necessary to look beyond these exhibits for the determination of the nub of the controversy—the construction and interpretation of the contract documents.

For convenience and as a summary, these exhibits are:

Exhibit No.	Description	Number of pages	Transcript of Record (Tr.) Page
1	INVITATION FOR BIDS, dated Wednesday, 7 December 1960, returnable 11 a.m., EST, Thursday, 22 December 1960	11	Tr. 23
2	SPECIFICATIONS for Construction of Herbert Hoover Dike—Levee 49 and Levee 60	73	Tr. 80
3	DRAWINGS—Levee 49, Sheets 1 to 8, Sheets 2, 3, 4 amended 12-13-60 Sheet 7 amended 12-21-60	8	Separate—not numbered
4	AMENDMENTS 1, 2 and 3 to Invitation for Bids, December 13, 14, 15, 1960	7	Tr. 35
5	BID, submitted on or before December 22, 1960	5	Tr. 42
6	CONSTRUCTION CONTRACT — Executed by plaintiff on Friday, 13 January 1961; executed by Government and mailed to plaintiff on Friday, 30 December 1960	22	Tr. 47

From the foregoing it is made to appear that on 7 December 1960 the Corps of Engineers issued invitations for competitive bids due at 11 a.m., 22 December 1960, for the construction of Levee 49 Herbert Hoover Dike, Lake Okeechobee, Florida, and other works, which described the same as follows:

> "* * * constructing about 7.65 miles of new levee, with a continuous borrow canal* on its land side and islands for later tree planting along the lake side * * *" (Exhibit 1, Tr. 24).

The invitation did not include the usual clause—that, if the bidder was in doubt as to the meaning of the language

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* It is to be observed from the contract drawings, especially Sheets 3 and 4, that the expression "continuous borrow canal" is not used, but instead there is used the expression "continuous borrow pit". The word "canal", used in the contract proper, had a meaningful purpose, for that the project embraced a drainage plan as well as a dike plan.

employed, he could before making a bid seek from the Contracting Officer a clarification or explanation. No explanation was ever given for the omission of this provision. The invitation did however contain an unusual reservation quoted in I-(b) of "Questions Presented", *supra*. Nor did the invitation contain the usual provision requiring all bidders to examine the site and fully familiarize themselves with the conditions thereof. Such a provision was however included in General Condition 3 of the Specs, page 22. An examination of the site was of no help to the bidder in determining the meaning of the language employed in the contract documents.

The invitation to bid was supported by 8 large sheets of drawings or plans, which were not schematic, but actually detailed designs of the work to be done. Also a part of the invitation were Specs consisting of 73 pages.

As stated *supra*, by express commands of the CFR and FPR, the drawings and Specs were required to depict the work to be done, "*clearly, accurately* and *completely*".

Petitioner within season made the bid, which was accepted by the Government, and a contract was awarded to it (Exhibit 6). This was signed by the Government on 30 December 1960 and by the contractor on 13 January 1961. The contract was on Standard Form 23. Attached to the contract were "General Provisions" on Standard Form 23A. These were printed, and on the face of many of the same were the stamped words,

"REVISED

See Paragraph 27"

Article 3, "Changes", and Article 4, "Changed Conditions", were not revised, but Article 6, "Disputes", was changed. The "Disputes Clause", "for civil works contract", was

identical with the Standard "Disputes Clause" promulgated by CFR. (Vol. 2, Title 41 U. S. C., p. 541, 41 CFR, Section 1-7.101-12.) This "Disputes Clause" is geared both to the Wunderlich Act and APA, quoted in Appendix III and IV.

The contractor began the work and completed the same within the time prescribed by the contract. During the course of the construction work, the contractor discovered that Sheets 3 and 4 of the Government's contract drawings were not only erroneous and faulty, but very misleading and negligently prepared in that they showed the bottom width of the continuous borrow pit to be only one-half the size of that actually needed to obtain the fill for the construction of the designed levee. This required the contractor to procure additional heavy equipment and rehandle the excavated material in order to cast the dredged material to the crown of the levee. This error in Sheets 3 and 4 of the plans, which was not detectable by fair and reasonable reading and interpretation of the same, increased the contractor's cost $297,222.93, for which it sought additional compensation under the "Disputes Clause" of the contract. Both the Contracting Officer and the representative agency of the Secretary, to-wit: Corps of Engineers, Board of Contract Appeals, known as Eng. BCA, denied the contractor relief. Such denial was on the basis that the contract drawings were not faulty, erroneous or misleading, although the Government admitted that the contractor was required to increase the size of the continuous borrow pit to a bottom width of twice that shown on the plans in order to obtain sufficient dredged materials to build the levee to the height and width required. A copy of the decision of Eng. BCA is appended hereto as *Appendix II* (Tr. 69).

Thereupon, on 3 March 1965 the contractor brought an action in the Court of Claims seeking such recovery. The Government on 16 June 1965 filed its answer denying that

the contract plans were faulty and contending that the decision of the administrative agency, Eng. BCA, denying recovery was one of fact and not of law, and hence final.

Both sides moved for summary judgment. The Government supported its motion for summary judgment with the entire record of the Eng. BCA. On 15 July 1966 the Court of Claims rendered a decision (Appendix I) denying the contractor relief, holding that the Government's plans were faulty, erroneous and misleading to a degree that such defects were glaring and obvious to any prudent bidder bidding on the project. This being true, the bidder could have protected itself by declining to bid—absent any provision in the invitation for a correction of the errors prior to bidding time. The Commissioner to whom the case was referred used the following sentence in his report:

> "Perhaps the ethical thing for the Contracting Officer to have done at this juncture would have been to admit his error and readvertise the contract with corrected drawings", (Tr. 233 at 242).

which sentence was changed by the Court of Claims to read as follows:

> "Perhaps the Contracting Officer, at this juncture, could have admitted his error and readvertised the contract with corrected drawings" (Tr. 335, at 341).

The heart of the controversy is to be found in Sheets 3 and 4 of the drawings (Exhibit 3). For ready reference there is attached hereto a copy of that portion of Sheet 3 bearing directly on the problem, as *Appendix V*, page 43. It shows in detail the levee which had been designed. It shows the berm and "required continuous borrow pit". The legend underneath the continuous borrow pit refers the reader to "Profile", which is to be found on Sheet 4. Sheet

4 gives in detail the "bottom width of the continuous borrow pit" at numerous stations during the 7.65-mile levee and canal. The Profile discloses that the bottom width of the continuous borrow pit over the entire 7.65 miles ranges from 60 feet to 100 feet. This corresponded with the design of the "continuous borrow pit" shown on Sheet 3. Both the Eng. BCA and the Court of Claims found that Sheets 3 and 4 showed a variation of the bottom width of the continuous borrow pit to range from 60 feet to 100 feet. As stated supra, actual construction required the contractor to extend the bottom width of the continuous borrow pit to twice that shown on Sheets 3 and 4, or over 200 feet. This compelled the contractor to handle the material twice, instead of once, and also required it to provide larger and heavier machines. The net result was that it increased the cost almost $300,000.00 over and above the bid or contract price. The Court of Claims in denying the contractor relief (Appendix I) held:

(1) That the plans and drawings were faulty, misleading and negligently prepared by the Government.

(2) That the Government knew of the errors in the drawings before acceptance of bids.

(3) That the Government, well knowing of the faulty drawings, elected to gamble, relying on a certain provision in the Specs as an exculpatory clause, quoted on page 4 of the decision, which provision is also to be found on page 44 of the Specs. This conclusion of the Court of Claims was grounded on the second sentence,

> "Embankment materials available in the required *cross section** of the continuous borrow pit, as shown on the

* By the use of the words "cross section" in the Specs, the Government further confirmed that what was shown on Sheet 3 was actually a design in detail, which proved during the construction work to be twice the width shown on said drawings.

drawings, are estimated to be less than the amount required to build the levee."

This emphasis on the second sentence ignored the third sentence, which qualified the second sentence. It is

"* * * additional levee fill required shall be obtained by extending the excavation as *indicated on the drawings*".

The third sentence directed the reader to Sheets 3 and 4 for the ultimate solution of the bottom width of the continuous borrow pit. As stated before, Sheets 3 and 4 showed this to be only one-half of what was actually required.

(4) That Eng. BCA had found that the contract drawings contained within themselves sufficient data with which to enable the bidder to detect the errors contained in the Government's plans, before bidding. Such finding was one of fact and not of law, and hence final under both APA and Wunderlich Act. The Court said,

"* * * The Board finding that the plaintiff could have ascertained the borrow pit width by a mathematical analysis of data in the contract documents must, therefore, be accepted as unchallenged * * *" (App. I, p. 25).

(5) Nothing was said in the decision concerning the applicability vel non of Article 3 "Changes" and Article 4 "Changed Conditions" of the General Provisions, which were standard provisions included in the contract (Exhibit 6). It may be that these Articles were not designed or intended to embrace faulty Government drawings and specifications.

(6) Nothing was said in the decision about the commands of the Code of CFR and FPR requiring the Government's drawings and Specs, upon which bids were invited, to

"clearly, accurately and *completely"* depict the work upon which bids were solicited. This command originated in 1959 by the General Services Administration, which was created as a result of Legislative Act of 30 June 1949 (Eff. 1 July 1949, 63 Stat. 379, 5 U. S. C. 630). It is the belief of the petitioner that the instant case is the first case which involves the breach or disregard by the Government of the above regulatory command touching construction work under the competitive bidding process. The absence of reported judicial decisions touching the above Regulation may be explained in part by the fact that it did not come into existence until *ca* 7 years ago, and hence was not in force at the time of the rendition of decisions prior to the present decade.

Jurisdiction of Court Below

The jurisdiction of the Court of Claims was grounded on 28 U. S. C. 1491 (claim founded on an express or implied contract). Notice of this statute and related statutes was taken in Paragraph 9 of the Petition (Tr. 20).

Reasons for Granting the Writ

The Court of Claims has decided an important question of Federal law relating to Government construction contracts procured through the process of competitive bidding, which, if allowed to stand, will have the effect of

(1) Deterring absolutely all competitive bidding on Government contracts, because of the risks imposed on the contractor due to faulty drawings and specifications prepared by the Government, or

(2) Resulting in increased cost of construction work due to the inclusion in the bid submitted of a "cushion" to

absorb any hidden defects contained in the Government's drawings and Specs.

The Court of Claims has decided a question of Federal law which is in conflict with:

(1) Decisions of this Court, such as:

About 91 years ago this Court said in the case of *Cooke* v. *United States,* 91 U.S. 389, 23 L.Ed. 237, decided 29 November 1875, that when the United States

> "* * * comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

This principle has been followed in a long undeviating line of decisions and expanded to include the principle that in construction contracts the Government is liable to the bidder and contractor for all loss sustained due to errors in the representations made by the Government in the invitation to bid and contract documents as to the nature, extent, quantity and quality of work to be done.

U. S. v. *Utah Stage Co.,* 199 U.S. 414, 26 S.Ct. 69, 50 L.Ed. 251, Decided 27 November 1905, Affd. 39 Ct.Cl. 420;

Hollerbach v. *U. S.,* 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898, Decided 2 April 1914, Rev. 47 Ct.Cl. 236;

U. S. v. *Smith,* 256 U.S. 11, 41 S.Ct. 413, 65 L.Ed. 808, Decided 11 April 1921, Affd. 54 Ct.Cl. 119;

Freund v. *U. S.,* 260 U.S. 60, 43 S.Ct. 70, 67 L.Ed. 131, Decided 13 November 1922, Rev. 56 Ct.Cl. 15;

U. S. v. *Rice,* 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53, Decided 9 November 1942, Rev. 95 Ct.Cl. 84.

See also the late decisions dealing with the Wunderlich Act,

U. S. v. *Bianchi & Co.,* 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed.2. 652, Decided 3 June 1963, Rev. 157 Ct.Cl. 432, 169 F.Supp. 514 with Annotation 10 L.Ed.2. 1207;

U. S. v. *Utah Construction & Mining Company,* 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2. 642, Decided 6 June 1966, Rev. 168 Ct.Cl. 522, 339 Fed.2. 606;

U. S. v. *Anthony Grace & Sons, Inc.,* 384 U.S. 424, 86 S.Ct. 1539, 16 L.Ed.2. 662, Decided 6 June 1966, Rev. 170 Ct.Cl. 688, 345 Fed.2. 808.

(2) Decisions of the Courts of Appeal and the District Courts, such as

Kayfield Construction Corp. v. *U. S.,* 278 Fed.2. 217 (CA 2), Decided 5 May 1960;

Eastern Service Management Company v. *U. S.,* 243 Fed.Supp. 302 (D.Ct., S.C.), Decided 8 July 1965;

U. S. v. *Pickett's Food Service,* 360 Fed.2. 338 (CA 5), Decided 6 May 1966;

(3) Decisions of the Court of Claims, such as

Fehlhaber Corp. v. *U. S.,* 151 Fed.Supp. 817, 138 Ct.Cl. 571, Decided 5 June 1957, Cert.Den. 355 U.S. 877, 78 S.Ct. 141, 2 L.Ed.2. 108, Decided 18 November 1957;

Beacon Construction Co. of Mass. v. *U. S.*, 314 Fed.2. 501, 161 Ct.Cl. 1, Decided 10 May 1963;
WPC Enterprises, Inc. v. *U. S.*, 323 Fed.2. 874, 163 Ct.Cl. 1, Decided 24 January 1964;
Kaiser Industries Corp. v. *U. S.*, 340 Fed.2. 322, 169 Ct.Cl. 310, Decided 22 January 1965;
C. J. Langenfelder & Son, Inc. v. *U. S.*, 341 Fed.2. 600, 169 Ct.Cl. 480, Decided 11 June 1965;
Blount Bros. Const. Co. v. *U. S.*, 346 Fed.2. 962 171 Ct.Cl., Decided 11 June 1965;
C. J. Montag & Sons, Inc. v. *U. S.*, 348 Fed.2. 954, 172 Ct.Cl., Decided 16 July 1965;
Thompson Ramo Wooldridge Inc. v. *U. S.*, 361 Fed.2. 222, Ct.Cl., Decided 13 May 1966.

On the day the Court denied plaintiff's petition for rehearing in the instant case (14 Oct. 1966, Tr. 372), the same Court decided a case diametrically opposite to its decision in the instant case. *Kraus* v. *United States* (14 Oct. 1966), 366 Fed.2. 975, included in the 5 December 1966 Advance Sheet.

The Court of Claims has decided a question of Federal Law—holding that all bidders on Government construction projects, pursuant to competitive bidding, must assume the risk and stand the loss occasioned by faulty drawings and Specs prepared by the Government, concerning which the bidder is helpless to correct. Such a decision is violative of all decisional law holding without retreat that the bidder has the right to rely upon the representation made by the Government in its invitation for competitive bids. If this decision is allowed to stand, it will have a disastrous impact upon the entire construction program of the Government, for that no bidder will dare to bid (nor can he afford to do so) upon an undertaking so fraught with hidden perils created by the Government.

Moreover, this case involves numerous principles of law relating to Government contracts, which have been ignored and disregarded in the decision under review, but which ought to be decided by this Court so that both the contractor or bidder, as well as the Government, may know their duties, obligations and rights under such construction contracts, such as "estoppel by negligence"—the Government admittedly negligent in the preparation of its drawings and Specs, ought not to escape liability therefor when the result will be that an innocent party must suffer. Is the Doctrine of "Unjust Enrichment" to be applied in Government contracts—shall the Government be allowed to be enriched unjustly through its own fault by making the contractor bear the loss occasioned by such fault on the part of the Government?

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX I

(Tr. 335)

IN THE

United States Court of Claims

No. 67-65

(Decided July 15, 1966)

JEFFERSON CONSTRUCTION CO. OF FLORIDA, A FLORIDA CORPORATION v. THE UNITED STATES

Carl A. Hiaasen, attorney of record, for plaintiff. *McCune, Hiaasen, Crum & Ferris,* of counsel.

Ray Goddard, with whom was *Assistant Attorney General John W. Douglas,* for defendant.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges.*

ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND FOR SUMMARY JUDGMENT AND ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PER CURIAM: This case was referred to Trial Commissioner C. Murray Bernhardt with directions to make recommendation for conclusions of law on plaintiff's motion for judgment on the pleadings and for summary judgment and defendant's cross-motion for summary judgment. The commissioner has done so in an opinion and report filed on Feb-

ruary 7, 1966. Exceptions to the commissioner's report were filed by the parties and the case was submitted to the court on plaintiff's request for review of the report and opinion, the briefs of the parties and oral argument of counsel. Since the court is in agreement with the opinion and recommendation of the commissioner, with modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case, as hereinafter set forth. Therefore, plaintiff is not entitled to recover, plaintiff's motions for judgment on the pleadings and for summary judgment are denied, defendant's cross-motion for summary judgment is granted and the petition is dismissed.

Commissioner Bernhardt's opinion*, as modified by the court, is as follows:

These dispositive cross-motions[1] portray a case of misleading contract drawings counteracted by a warning specification and a contractor's duty to inquire. The case originates in a contract awarded plaintiff to construct a levee in Florida. Earth for the levee was to be obtained from a "continuous borrow pit" bordering the levee embankment site throughout its 7.65-mile length. Specifications enumerated the minimum equipment to have on the job. Drawings provided dimensional and other data for the levee and the

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* The opinion and recommended conclusion of law are submitted pursuant to order of the court under Rule 54(b). The facts are stated in the opinion.

[1] Plaintiff's motion for judgment on the pleadings and motion for summary judgment, and defendant's cross-motion for summary judgment. Plaintiff's motion also prays that the defendant's affirmative defense in paragraph 12 of the answer be stricken. Paragraph 12 of the answer alleges plaintiff's failure to plead that the decision of the Corps of Engineers Board of Contract Appeals was arbitrary, capricious, etc., as per the Disputes clause of the contract.

adjacent borrow pit. On behalf of its subcontractor which sustained the eventual loss, the plaintiff contends that the drawings depicted a borrow pit of much narrower width than was actually required, and that the greater width necessitated the use of more equipment and rehandling of more borrow material than the plaintiff could have reasonably contemplated. This came about because a dragline of a given boom length, operating in the center or on the edge of the berm could have scooped each load of earth from a borrow pit with a bottom width of 100 feet and deposited it in position on the levee embankment in one continuous motion, whereas in a wider borrow pit the reach of the dragline boom would be insufficient to perform the operation in one motion but would require rehandling of excavated material. At the conclusion of performance the contractor submitted a claim of $297,229.93 to the contracting officer under the standard Changes clause of the contract for its unanticipated costs. The Corps of Engineers Board of Contract Appeals confirmed the contracting officer's rejection of the claim for the assigned reason that the plans and specifications, read together, were not misleading and contained information sufficient to enable plaintiff to estimate accurately the width of the borrow pit required to provide the known quantity of earth to build the levee embankment to its design dimensions.

Sheet 3 of the contract drawings depicts a typical cross-section of the levee and its adjoining borrow pit on a given scale. Typically the levee cross-section shows an earth mound of prescribed configuration, a flat earth berm connecting it to the borrow pit, and a borrow pit with sloping sides and a flat bottom. An extension of one side of the borrow pit is shown in dotted lines marked "Additional Excavation as required for levee fill", meaning that any

additional borrow material to meet the earthfill requirements of the levee would be obtained from that side of the borrow pit furthest away from the levee. Application of the scale to the borrow pit drawing discloses a bottom width of 80 feet, plus 20 feet horizontally for additional excavation if needed. The typical cross-section states in a legend, however, that the bottom width of the borrowing pit "Varies (see profile)", and below that is the wording—

> Bottom widths of required continuous borrow pit section shall be as shown on the profile except as otherwise provided in the specifications.

The profile information referred to in the drawing on sheet 3 is contained in sheet 4 of the drawings. Sheet 4 depicts core boring and elevation data at ten separate locations on the length of the levee. These ten sections reflect bottom widths of the continuous borrow pit ranging from 60 to 100 feet. In most areas of the levee the actual width of the excavated borrow pit approximated 200 feet, thus causing the additional costs for which the plaintiff seeks reimbursement.

The Board reached no clearly stated decision on the conflicting evidence of the parties as to whether the job could have been performed on time with the equipment listed in the specifications as the minimum required to perform if the bottom width of the borrow pit had averaged 100 feet as the plaintiff had anticipated. The plaintiff had mobilized the minimum list of equipment on the job at the outset. However, the notice to proceed issued by the contracting officer to the plaintiff warned the latter that it had "insufficient equipment to prosecute the work within the time element specified in the contract", and threatened to terminate the

contract if plaintiff did not prove within 90 days that it had sufficient equipment.

The Government's principal defense is based on paragraph 2–03a. of the Technical Provisions of the contract, reading as follows:

> a. Continuous Borrow Pit for L–49: The continuous borrow pit adjacent to Levee 49 shall conform to requirements prescribed herein and as shown on the drawings. Embankment materials available in the required cross section of the continuous borrow pit, as shown on the drawings, are estimated to be less than the amount required to build the levee. The additional levee fill required shall be obtained by extending the excavation as indicated on the drawings. If the required borrow pits should yield more fill material than needed for embankment construction, the width shall be decreased uniformly from top to bottom as required. It is recognized that variations in the nature of the materials encountered and the quantity of fill required for the levees will result in the width and/or depth of the borrow pits being greater than the "Required Continuous Borrow Pit Section" indicated on the drawings. The bottom of the canal shall be left relatively smooth and level. Abrupt changes of grade or width shall be avoided. All suitable materials excavated shall be used in the adjacent embankment.

The cited Technical Provision should have been enough to alert the plaintiff to the likelihood that the borrow pit would have to exceed the widths shown on sheets 3 and 4 of the drawings in order to provide sufficient fill for the levee design, or at least put plaintiff on notice to inquire, assuming that the contract documents furnished enough data for such

ascertainment. While ambiguous contract provisions are construed against the author (*Peter Kiewit Sons' Co.* v. *United States,* 109 Ct. Cl. 390 (1947)), and a contractor is not usually obligated to seek clarification of all interpretative problems inhering in the contract terms, he must nevertheless inquire where the discrepancy, omission or conflict is obvious (*Consolidated Eng'r. Co.* v. *United States,* 98 Ct. Cl. 256, 280 (1943); *Jefferson Construction Co.* v. *United States,* 151 Ct. Cl. 75, 89-91 (1960)), and most particularly so when a specification provision affirmatively warns him of such possible discrepancies in the plans (*WPC Enterprises Inc.* v. *United States,* 163 Ct. Cl. 1, 6, 323 F. 2d 874, 876 (1963), and collated authorities), or where a contract article requires him to submit detected discrepancies to the contracting officer for decision (*Beacon Construction Co.* v. *United States;* 161 Ct. Cl. 1, 6, 314 F. 2d 501, 504 (1963)).[2] The unit price schedule in the contract in suit gave the amount of excavation estimated for the levee, and this proved to be reasonably accurate. The Board found, and this may be accepted as a finding of fact based upon the administrative record of adversary testimony and exhibits, that "the plans and specifications contained sufficient information for the making of the computations above described had appellant chosen to do so." The computations "above described" involved a computation of the cross-sectional area of the levee and berm at several stations throughout the length, a similar computation of the cross-sectional area of the required borrow pit at the same stations, and consequent mathematical calculation of the excess borrow pit

[2] Article 2 of the contract in suit is virtually identical to the corresponding article in the *Beacon Construction* case, *supra,* which was invoked by the court to counter the general rule that ambiguities in a contract will be construed against the party drafting the instrument.

width to be excavated to supply the required quantities of borrow material.

Neither of the parties point out the precise mechanics of this mathematical computation so that it may be determined whether the above finding of the Board is supported by substantial evidence. The defendant has attached to its motion the entire administrative record, but if that record does not support the Board finding it is the plaintiff's responsibility to establish the fact. It is not the court's duty to supply such a deficiency by an independent study of those parts of the administrative record not selected by the parties for scrutiny, although the court is not precluded from doing so, if it chooses. The Board finding that the plaintiff could have ascertained the borrow pit widths by a mathematical analysis of data in the contract documents must, therefore, be accepted as unchallenged, leaving only the added question of whether circumstances would excuse plaintiff from thus protecting itself from an improvident bid.

The only circumstances which offer possible excuse for the plaintiff's omission are the misleading nature of the drawings on sheets 3 and 4, and the fact that plaintiff was given only two weeks prior to bid opening for the preparation of its bid. We are not informed as to the reasons why the borrow pit widths shown in the profiles on sheet 4 ranged only from 60 to 100 feet, no more than we are told of the actual borrow pit widths at those ten stations. Standing alone, the drawings on sheets 3 and 4 would have been enough to warrant the plaintiff's conclusion that the maximum borrow pit width would be 100 feet, but the drawings caution bidders to consult the specifications. Technical Provision 2.03a. of the specifications (quoted, *supra*) could not have been read by any thinking bidder without conveying

the clear warning that the borrow pit dimensions shown in the drawings were probably not enough to provide sufficient fill for the levee requirements. Even at this point the plaintiff might have been excused for misunderstanding the borrow pit dimension prospects if it had been unable to extract from other contract documents the actual conditions. The means to satisfy this inquiry were apparently at hand but not availed of for reasons we can only surmise. It is not enough for the plaintiff to plead lack of opportunity because of the restricted period available for the preparation of its bid estimates, for the trite but true answer to that is that it should not have risked submitting a bid without paying careful attention to the specifications.

In finding the plaintiff to be technically liable for its own carelessness in underestimating contract requirements, it is to be remarked that the Government was also negligent in the preparation of data for the invitation. Quite obviously the Government was mistaken as to the prospective widths of the proposed borrow pit at the time the invitations and drawings were framed, else the drawings would have suggested borrow pit widths more closely approximating the actual widths, and the minimum list of equipment required to do the job would have been substantially greater than that contained in the specifications. Obviously, too, the Government became aware of its error sometime prior to issuance of the notice to proceed, for coincidentally with the proceed order the contracting officer warned the plaintiff that the minimum items of equipment which the plaintiff had mobilized at the outset were not sufficient and, unless it was augmented within 90 days by enough to perform the work within the required time, the contract would be terminated. Perhaps the contracting officer, at this juncture, could have admitted his error and readvertised the

contract with corrected drawings. Or he could at least have amended the drawings prior to awarding the contract and given those who had bid an opportunity to amend their bids.[3] Instead, the contracting officer chose to rely on the protection afforded by paragraph 2–03a. of the Technical Provisions, realizing that this clause put the onus of error on the bidders.

On the state of those parts of the administrative record specified by the parties there seems to be little doubt of the factual and legal correctness of the Board's decision. However, in its petition the plaintiff asks permission to submit at trial additional expert testimony "touching the construction and interpretation" of the contract. *Morrison-Knudsen Co., Inc.* v. *United States,* 170 Ct. Cl. 757, 345 F. 2d 833 (1965), holds that where a contract appeals board can grant relief on a claim whose predominant issue is one of law, such as the interpretation of contract provisions, its findings as to facts directly related to the legal issue are to be accorded finality under the Wunderlich Act, 41 U. S. C. §§321, 322, and the decision of the Supreme Court in *United States* v. *Carlo Bianchi & Co., Inc.,* 373 U. S. 709 (1963). As in the *Morrison-Knudsen* case, *supra,* our plaintiff's claim was prosecuted administratively under the Changes clause; both involved primarily the interpretation of contract provisions; as such the issue in each was one of law, well within the Board's authority to adjudicate without finality, but the Board's decision on related facts must necessarily be ac-

[3] On December 13, 1960, nine days prior to the submission of plaintiff's bid, the contracting officer amended the invitation by issuing revised plan sheets 2, 3, and 4, making minor amendments to drawings which do not affect the issues in the present case. The plaintiff accepted the amendments in its bid. Thus the Government did nothing to clarify the ambiguity in the drawings even though the occasion presented itself.

corded finality and cannot be judicially supplemented by a new trial in the court. *Ergo,* the plaintiff's request for permission to present *de novo* evidence must be denied, its motions for judgment on the pleadings and for summary judgment must be denied, the defendant's motion for summary judgment must be granted, and the petition dismissed.

APPENDIX II

(SEAL)

HEADQUARTERS
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON 25, D.C.

Before the Corps of Engineers Board of Contract Appeals

Eng BCA No. 2425

Appeal of

JEFFERSON CONSTRUCTION COMPANY OF FLORIDA

Under Contract No. DA-08-123-CIVENG-61-45

APPEARANCES FOR THE APPELLANT:

McCune, Hiaasen, Crum & Ferris
Fort Lauderdale, Florida

By: Carl A. Hiaasen, Esq.

APPEARANCES FOR THE GOVERNMENT:

Gordon A. Satterwhite, Esq.
Atlanta, Georgia

OPINION BY MR. GRANT

This claim in the amount of $297,229.93 and a time extension of 60 days is brought in behalf of a subcontractor, Garden Builders, Inc. (hereinafter Garden). The contract was for construction of Herbert Hoover Dike, Levees 49 and 60, Central and Southern Florida Project, that portion of the work involving Levee 49 giving rise to this claim.

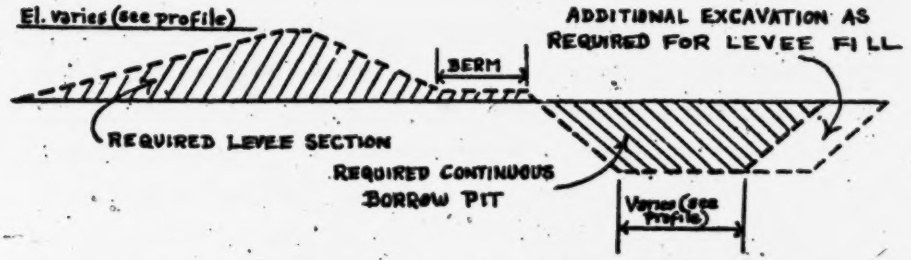
Appendix II

Appellant seeks relief under the Changes provision of the contract, claiming that it was required to do more work in constructing Levee 49 than represented in the contract plans and specifications. The claim centers on a continuous borrow pit, shown on the plans and referred to in the specifications, located adjacent to and extending substantially the entire length (7.2 miles) of the levee. This borrow pit was to be appellant's source of materials for constructing the levee embankment. Briefly, appellant's contention is that the contract represented that the material required for the levee could be obtained by digging the continous borrow pit to a width much less than the width which actual performance proved to be necessary; that digging to the greater width necessitated rehandling of much of the borrow material, resulting in substantial expense to appellant not covered by its bid in which rehandling had not been considered. Appellant claims entitlement to these allegedly unanticipated costs of rehandling. The Government's position is that the plans and specifications contained information sufficient to enable appellant to make an accurate estimate of the width of continuous borrow pit required to construct the levee; that they contained no representation that such width would be less than that actually excavated; that appellant in preparing its bid should have been aware of the necessity of, and provided for, rehandling of borrow material.

FACTS

Appellant focuses its argument principally on information provided by the Government on Sheets 3 and 4 of the contract plans. Sheet 3 contained a "typical section" (Scale 1" =30) showing principal features of the work (levee, berm and borrow pit) without reference to any specified

station. Below is a reproduction of this typical section not drawn to scale and eliminating certain information contained in the original not considered relevant to this appeal.



TYPICAL SECTION
Scale: 1" = 30'

Bottom widths of required continuous borrow pit section shall be as shown on the profile except as otherwise provided in the specifications

Sheet 4 of the plans contained in the profiles referred to on the typical section (above). The profiles, among other things, showed bottom widths of the "Required Continuous Borrow Pit" ranging from a minimum of 60 ft. to a maximum of 100 ft.

Appellant says that the typical section on Sheet 3 and the profiles on Sheet 4 contained the information as to width of the borrow pit on which its bid was based; that it interpreted the typical section as representing that the bottom width of the borrow pit would vary in accordance with the amounts of material required to construct the levee to required dimensions and that such variations in bottom width were those shown on the profiles on Sheet 4, noted above, ranging from 60 ft. to 100 ft. In this connection appellant invites our attention to the fact that the bottom width of the required continuous borrow pit, as shown on the typical section, scales at 80 ft., and that the bottom width of the area designated as "additional excava-

tion as required for levee fill" scales an additional 20 ft., making a total bottom width of borrow pit of 100 ft. He points out this 100 ft. bottom width corresponds exactly with the maximum bottom width of the "required continuous borrow pit" as shown on the Sheet 4 profiles.

The evidence is that Garden used the above-mentioned information on Sheets 3 and 4, which it interpreted as indicating a 100 ft. maximum bottom width of borrow pit, to estimate its equipment requirements for the job. Based on this indicated maximum width, Garden estimated that "a single machine [dragline] with approximately 120 to 130 feet of boom would be able to sit on or right next to the berm, cast out at these maximum sections, drag the material in, turning 180 degrees and deposit the material in close proximity to its final position in the levee." As shown by the Plant and Equipment Schedules attached to appellant's bid, Garden proposed to do the work with one 7 yd. dragline, one 2 yd. dragline, three tractors and one earthmover. Appellant offered testimony that this equipment would have been adequate for the job had there been, in accordance with its reading of the plans, no rehandling of borrow material required.

From the very outset of the work, however, Garden found that a large amount of borrow material had to be rehandled. This resulted from the fact that in order to secure sufficient embankment material to construct the levee as designed, Garden found it necessary to excavate the borrow pit as much as 100 feet wider than it had estimated from the contract plans. Consequently, it was forced to bring additional equipment (primarily draglines) onto the job in an effort to accomplish the rehandling and finish the work within the 420 days allowed. In this connection, the Govern-

ment offered convincing evidence that even had no rehandling been necessary, appellant could not have completed the work in 420 days using with maximum efficiency the limited amount of dragline equipment listed in its Plant and Equipment Schedule.

With reference to the list of equipment appended to appellant's bid, the Notice to Proceed issued by the Contracting Officer under date of 12 January 1961, contained the following:

> This project has been analyzed, using the equipment you listed. It is our opinion you have insufficient equipment to prosecute the work within the time element specified in the contract.
>
> I am hereby notifying you that I will allow you 90 days to prove you have sufficient equipment on the job to prosecute this work within the time allowed, or termination of your right to proceed will be considered.

As noted earlier, Garden did in fact have to put a large amount of additional equipment on the job in order to cope with the greater-than-anticipated width of borrow pit and resultant material rehandling.

The Government's defense to the claim rests primarily on the following portion of the contract's Technical Provisions:

> 2-03 RIGHT OF WAY AND BORROW AREAS:
>
> a. Continuous Borrow Pit for L-49: The continuous borrow pit adjacent to Levee 49 shall conform to requirements prescribed herein and as shown on the drawings. Embankment materials available in the requried cross section of the continuous borrow pit, as shown on the drawings, are estimated to be less than

the amount required to build the levee. The additional levee fill required shall be obtained by extending the excavation as indicated on the drawings. If the required borrow pits should yield more fill material than needed for embankment construction, the width shall be decreased uniformly from top to bottom as required. It is recognized that variations in the nature of the materials encountered and the quantity of fill required for the levees will result in the width and/or depth of the borrow pits being greater than the "Required Continuous Borrow Pit Section" indicated on the drawings. The bottom of the canal shall be left relatively smooth and level. Abrupt changes of grade or width shall be avoided. All suitable materials excavated shall be used in the adjacent embankment.

The Government argues that the quoted provision clearly warned the contractor that embankment materials available in the required cross-section of the continuous borrow pit, as shown on the drawings, would be less than the amount required to build the levee and that additional fill would, for the most part, be obtained by widening the excavation; that in order to arrive at an accurate estimate of the width to which it would have to excavate the borrow pit (and of the equipment required to do the work) appellant would have had to make a series of mathematical computations using the standard "average end area" method. This method involves, first, a computation of the cross-sectional area of the levee and the berm at several stations along the length thereof; second, a computation of the cross-sectional area of the "required borrow pit" at the same stations; and lastly, a computation of the additional width, if any, of borrow pit beyond the limits of the "re-

quired borrow pit" required to produce sufficient material to construct the levee.

Appellant in preparing its bid did not attmpt, using the method described above, or any other method, to determine mathematically whether sufficient material to construct the levee would be available within the limits of the "required continuous borrow pit" as shown on the drawings. It assumed, in effect, that the borrow pit, as well as the levee, had been designed, and that the limits of the "required continuous borrow pit" as shown on the Sheet 4 profiles fixed the widths to which excavation would be required.

We find that the plans and specifications contained sufficient information for the making of the computations above described had appellant chosen to do so.

We further find that the actual pay quantity of excavation for the job was approximately 4% less than the quantity estimated by the Government in the unit price schedule. This finding is made in connection with appellant's assertion that the contract's Variations in Estimated Quantities clause is applicable to this claim. Appellant's argument in this regard is discussed hereinafter.

Appellant's claim for an extension of time is made to secure a release of liquidated damages withheld by the Contracting Officer in the amount of $8,600.00 (43 days @ $200.00 per day).

The contract called for completion of the work within 420 calendar days after receipt by appellant of Notice to Proceed. *The proof is that as of the 418th day, 7 March 1962, appellant had completed all items of work and that its only remaining* responsibility, as pertinent to this appeal, was that covered by paragraph 4-12 of the technical provisions. This paragraph, providing for establishment of grass cover, listed items such as watering, mowing, re-

seeding and refertilizing, all optional with the Contracting Officer, for which appellant was to be responsible for a 45-day period following completion of seeding of the project. Seeding was completed on 7 March 1962. The liquidated damages assessed covered the 43 days beyond the contract completion date during which the contractor's responsibility under paragraph 4-12 continued.

In support of its claim for time extension, appellant asserts that it was delayed for 60 days in completion of the work, through no fault of its own, as a result of having to rehandle material excavated from the continuous borrow pit; it further argues alternatively, that the work was actually completed on 7 March 1962, and that the 45-day grass establishment period should not be regarded as time required for contract completion as far as assessment of liquidated damages is concerned.

Decision

Appellant has not persuaded us that it is entitled to additonal compensation. We think that its difficulties stemmed from placing too much emphasis on the contract drawings and not enough on the specifications.

Following the general rule of contract construction, appellant was obligated to read all parts of the contract together—in this particular case, Sheets 3 and 4 of the contract drawings with paragraph 2-03 of the Technical Provisions. Giving due weight to both drawings and specifications, we think the conclusion is inescapable that appellant should have anticipated having to excavate beyond the limits of the "Required Continuous Borrow Pit" as shown on the drawings and should have estimated its equipment requirements accordingly.

Appendix II

The "typical section" set forth on Sheet 3 was just that. Although drawn to scale, it was not represented as the section of any particular station along the levee. It simply showed the main features of the work with certain explanatory notes. In relation to this case, the most important feature illustrated was the area designated "additional excavation as required for levee fill." This area was delineated by a light dashed line landward from the levee and adjacent to the area designated "required continuous borrow pit." By note on the typical section, bidders were advised that the bottom widths of that portion of the borrow area designated "required continuous borrow pit" would be as shown on the profile on Sheet 4 *except as otherwise provided in the specification.* Going then to the specifications, bidders were advised that "embankment materials available in the required cross-section of the continuous borrow pit, as shown on the drawings, are estimated to be less than the amount required to build the levee" and that "the additional levee fill required shall be obtained by extending the excavation as indicated on the drawings." Finally, and most significantly, bidders were told that "variations in the nature of the materials encountered and the *quantity of fill* required for the levees will result in the width and/or depth of the borrow pits *being greater than the "Required Continuous Borrow Pit Section" indicated on the drawings.*" (Although excavation to a greater depth than shown on the drawings is indicated as a possible method of obtaining additional embankment material, the parties are in agreement in reading TP 2-03 as requiring such material to come from widening, rather than deepening, the borrow pit).

In our opinion, the quoted provisions of TP 2-03 clearly advised appellant that the "required continuous borrow pit" as shown on the drawings would not provide sufficient ma-

terials for construction of the levee and would, therefore, have to be widened. Having been clearly advised to the contrary, appellant was not justified in assuming that the drawings defined accurately the widths to which the borrow pit would be excavated. Therefore, the employment of such assumption for the purpose of estimating equipment requirements was unwarranted. The only way in which these requirements could be accurately estimated was by making "average end area," or similar, computations as described in the factual discussion, above. The drawings and specifications contained adequate information for making such computations.

In arguing that the Variations in Estimated Quantities provision (SC-3) of the contract constituted a warranty or representation, relied upon by appellant, of the accuracy of the drawings depicting the borrow pit within the range of 115% to 87%, appellant misapprehends the purpose of the provision. The purpose of the clause is not, as appellant would have us believe, to warrant the accuracy of estimates or dimensions. Rather, it is a device for elimination of contingencies in bids and provides for adjustments in contract price where actual quantities of pay items vary from the estimated quantities by greater percentages than the limitations mentioned. The Variations in Estimated Quantities clause does not come into play in the instant case for the reason that actual quantities of material excavated were within 4 per cent of the estimated quantities, well within the percentage range set forth in the clause.

As to appellant's claim for an extension of time, we think it has established entitlement thereto. The claim was initially advanced on the ground that the Government, in requiring appellant to excavate the continuous borrow pit beyond the limits indicated in the plans and specifications,

caused delay to the completion of the job to the extent that 43 days of the 45-day grass establishment period fell beyond the contract completion date. The claim, as asserted on this basis, falls with our decision that appellant was required to do no more than the contract called for in connection with excavation of borrow material.

However, appellant's alternative argument—that the running of the 45-day period was not required for contract completion—appears to us meritorious. Paragraph 4-12 of the technical provisions, which established the period, imposed no definite work requirements. Essentially, it merely fixed a period of contractor responsibility for insuring that seeded areas became established. Such minor work as the Contracting Officer might have required thereunder was at his option and he was, in fact, authorized to shorten the period as to acceptably established areas. Under the circumstances, we are of the opinion that expiration of the 45-day period was not required for contract completion. Had the Government intended otherwise, we think it should have specified, as it did, for example, with respect to "final cleanup of the premises," (SC-1, Commencement, Prosecution and Completion), that the time stated for completion was to include such 45-day period. We hold, therefore, that appellant completed its work by the contract completion date and that liquidated damages were improperly assessed.

The appeal is SUSTAINED as to the item wherein improper assessment of liquidated damages is claimed and otherwise DENIED. The file is remanded to the Contracting Officer for further action in accordance with the foregoing.

Date: 6 January 1964

/s/ QUENTIN E. GRANT
QUENTIN E. GRANT
Member of the Board

Appendix II

I *concur*

/s/ JOHN P. JELLICO
JOHN P. JELLICO
Deputy Chairman

I concur

/s/ WALTER GUTMANN
WALTER GUTMANN
Member of the Board

* * * * * * * * *

I certify that the foregoing is a true copy of the Corps of Engineers Board of Contract Appeals Decision No. 2425, appeal of Jefferson Construction Company of Florida, under Contract No. DA-08-123-CIVENG-61-45.

Date: 22 Jan 1964

/s/ FLORA A. BARTH
FLORA A. BARTH
Recorder

APPENDIX III

ADMINISTRATIVE PROCEDURE ACT—APA. OF JUNE 11, 1946

Section 10-(e)

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX IV

WUNDERLICH ACT
MAY 11, 1954

CHAPTER 199—PUBLIC LAW 356

[s. 24]

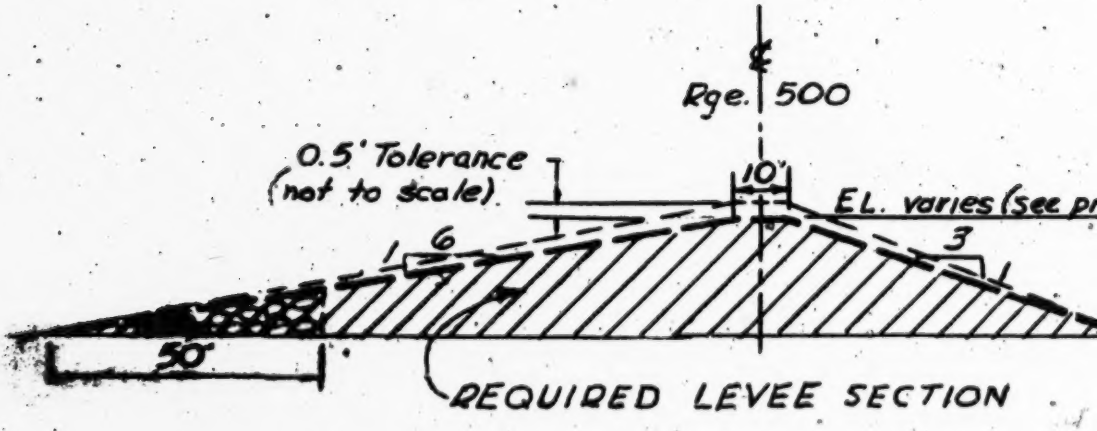
An Act to permit review of decisions of the heads of departments, or their representatives or boards, involving questions arising under Government contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Approved May 11, 1954.

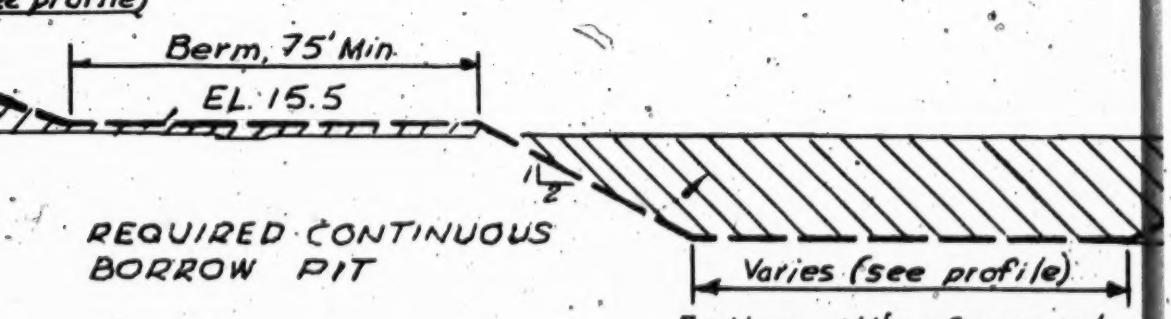


TYPICAL SECTION

SCALE: 1" = 30'

SEE SHEET 2 FOR NO

ee profile)



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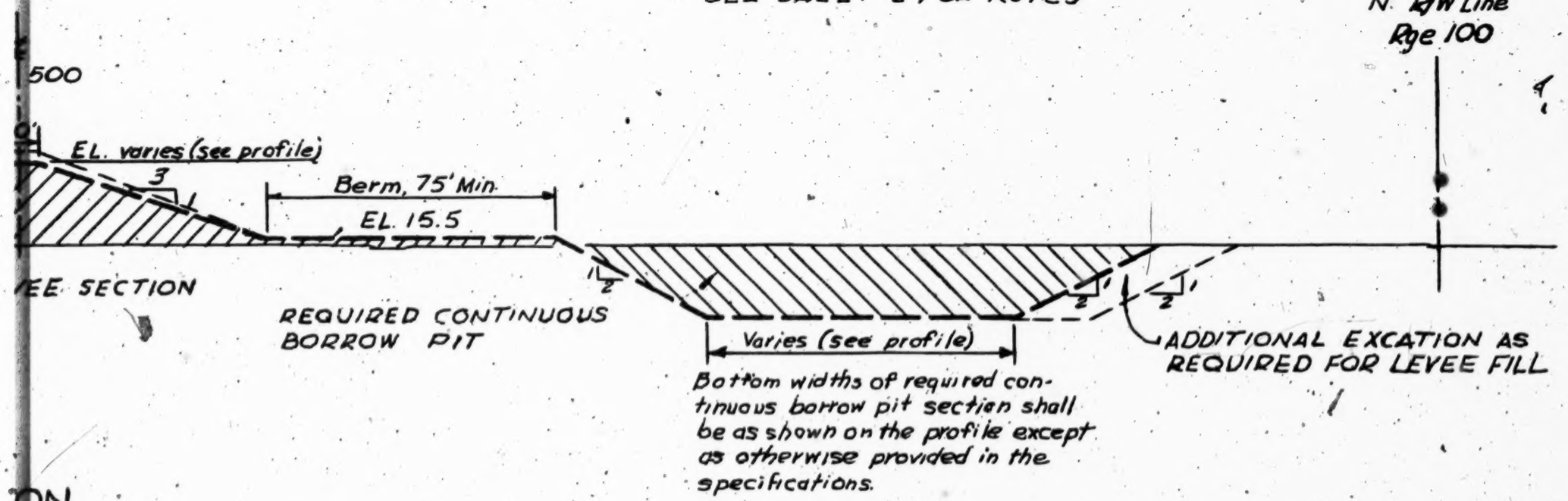
specifications.


SEE SHEET 2 FOR NOTES
N. R/W Line
Rge 100
500
EL. varies (see profile)
3
Berm, 75' Min.
EL. 15.5
EE SECTION
REQUIRED CONTINUOUS
BORROW PIT
1/2
1
2
1
2
1
Varies (see profile)
ADDITIONAL EXCATION AS
REQUIRED FOR LEVEE FILL
Bottom widths of required continuous borrow pit section shall be as shown on the profile except as otherwise provided in the specifications.
ON

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 923

JEFFERSON CONSTRUCTION CO. OF FLORIDA, A FLORIDA CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were successful bidders on a contract with the Army Corps of Engineers to construct a levee in Florida. They seek to recover unanticipated extra sums which were expended, allegedly because of misleading plans prepared by the government. They claim that the plans which accompanied the specifications set forth a drawing which provided for an adjacent "borrow pit" which was not to exceed 100 feet in bottom width. Assertedly in reliance upon

this drawing and a profile which accompanied it, petitioners' subcontractor procured equipment for excavation which did not suffice to excavate the earth actually required to construct the levee, and they were required to procure additional equipment and make a borrow pit as much as 100 feet wider than they had estimated from the plans. The contracting officer rejected their claim for extra compensation and petitioners sought review before the Corps of Engineers Board of Contract Appeals. The Board upheld the decision of the contracting officer. The Board found that paragraph 2-03 of the technical provisions put petitioners on notice that

> It is recognized that variations in the nature of the materials encountered and the quantity of fill required for the levees will result in the width and/or depth of the borrow pits being greater than the "Required Continuous Borrow Pit Section" indicated on the drawings.

The Board further found that the plans and specifications, when read together, enabled petitioners to make computations which would have indicated the necessary width of the borrow pit. Additionally, the Board pointed out that the drawing upon which petitioners relied specifically advised them that "Bottom widths of required continuous borrow pit section shall be as shown on the profile *except as otherwise provided in the specifications*" (emphasis added). Petitioners loss, it was held, was caused by their carelessness in not basing their estimates on all of the materials provided.

The Court of Claims upheld the Board's determination. The court found that although the drawings may have been misleading, petitioners were cautioned to consult the specifications and that "[T]echnical Provision 2.03a of the specifications * * * could not have been read by any thinking bidder without conveying the clear warning that the borrow pit dimensions shown in the drawings were probably not enough to provide sufficient fill for the levee requirements". The court further accepted as unchallenged the Board's finding that petitioners could have computed mathematically the necessary width of the borrow pit.

There is no occasion for further review by this Court. The decision of the court below was based upon its conclusion that there was ample support in the administrative record for the findings of the Board of Contract Appeals. This conclusion was plainly correct and, in any event, turned wholly upon the particular facts of the case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

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